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No. 90-1947

In The

Supreme Court of the United States

October Term, 1991

JOHN K. YEE, et al.,

Petitioners,

v.

THE CITY OF ESCONDIDO,

Respondent.

On Writ of Certiorari to the Fourth Appellate District, Division One, Court of Appeal for the State of California

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS JOHN K. YEE, ET AL.

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS JOHN K. YEE, ET AL.

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of petitioners John K. Yee, *et al.* Written consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of this Court.

INTEREST OF AMICUS

Pacific Legal Foundation is a nonprofit corporation organized under the laws of the State of California for the

purpose of engaging in litigation in matters affecting the public interest. Policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys.

PLF has participated in numerous cases involving the Takings and Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. Its attorneys were counsel of record in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and PLF participated as amicus curiae in *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987); *Hodel v. Irving*, 481 U.S. 704 (1987); and *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987). PLF's public policy perspective and litigation experience in support of private property rights will provide a helpful additional viewpoint on the constitutional issues presented in the case at bar.

STATEMENT OF THE CASE

Petitioners, owners of mobile home parks in the City of Escondido, brought an action in state court challenging, as a taking without compensation, the city's mobile home rent control ordinance. The ordinance, in concert with the state Mobilehome Residency Law (Cal. Civ. Code § 798, *et seq.*), grants the owners of coaches situated in petitioners' parks a perpetual right to occupy petitioners' property at below market rents. Anyone who purchases a mobile home coach from an existing occupant of an Escondido park acquires that same right.

Petitioners allege that the in-site price of coaches in Escondido mobile home parks has increased dramatically since passage of the rent control ordinance. They allege that this increase is due entirely to the fact that existing park occupants are able to monetize the value of perpetual occupancy of the park owners' property at controlled rents. *Yee v. City of Escondido*, 224 Cal. App. 3d 1349, 1352 (1990).

Rather than let petitioners prove these allegations at trial, the trial court sustained the city's demurrer, without leave to amend, and dismissed the action. The California Court of Appeal affirmed, ruling that the complaint did not state a cause of action for an uncompensated taking under the Fifth Amendment to the United States Constitution. The California Supreme Court declined to review the decision.

Three federal appellate court decisions have held that regulations virtually identical to Escondido's violate the Takings Clause under the "permanent physical invasion" standard laid down by this Court in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). These three decisions, *Hall v. City of Santa Barbara*, 797 F.2d 1493 (9th Cir. 1986); *Pinewood Estates v. Barnegat Township Leveling Board*, 898 F.2d 347 (3d Cir. 1990); and *Azul Pacifico, Inc. v. City of Los Angeles*, No. 90-55853, 90-56066 (9th Cir. Nov. 1, 1991) (1991 WESTLAW 224528 CTA9 Database) are soundly based on the Fifth Amendment and are unassailably correct expressions of federal constitutional law.

Petitioners' counsel argues capably that this line of authority is dispositive in establishing that the facts alleged in this case would comprise a violation of the

Takings Clause. While not disputing that conclusion, this amicus will go farther and argue that such a finding employs a *needlessly stringent* constitutional standard. It is in fact irrelevant whether the Escondido ordinance violates *Loretto*'s physical invasion test, since the measure in question is blatantly unconstitutional under this Court's more general regulatory takings doctrine. Indeed, it can be further argued that an outright uncompensated transfer of a property interest from one private party to another is a *per se* violation of the Takings Clause, subject neither to the general regulatory takings analysis nor to the *Loretto* standard. Under either line of reasoning the Escondido ordinance must be found to violate the Takings Clause *irrespective of whether this Court believes a Loretto-style permanent physical invasion has occurred.*

SUMMARY OF ARGUMENT

Petitioners have alleged facts showing that the City of Escondido's regulations have confiscated a valuable property interest from petitioners and transferred it to certain third parties without compensating petitioners for their loss. The property interest at issue—a marketable servitude in land—is recognized by state law and protected by the United States Constitution. These allegations, if proven at trial, are sufficient to establish a violation of the Takings Clause under three separate legal theories.

Two United States Circuit Courts of Appeals have determined that virtually identical facts establish a constitutional violation under the "permanent physical

invasion" theory. *Hall v. City of Santa Barbara*, 797 F.2d 1493; *Pinewood Estates v. Barnegat Township Leveling Board*, 898 F.2d 347; and *Azul Pacifico, Inc. v. City of Los Angeles*, 1991 WL 224528.

Petitioners' allegations would also establish a regulatory taking under this Court's guidelines in *Nollan v. California Coastal Commission*. The city's uncompensated seizure of petitioners' property advances no legitimate governmental interest. By transferring a marketable servitude from petitioners to other private parties, the City of Escondido has deprived petitioners of economically viable use of this valuable property interest. Finally, the city's regulations unfairly force a small group of property owners to bear the full costs of what should be a general public burden.

A third line of this Court's decisions, including *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), and *Hodel v. Irving*, 481 U.S. 704, demonstrates that the outright uncompensated transfer of an interest in title constitutes a *per se* taking. Under this line of precedent, the regulations at issue in this case violate the Takings Clause irrespective of the outcome of the regulatory takings analysis and regardless of whether a physical invasion has occurred.

Because petitioners have stated a cause of action under any of these three theories, they are entitled to a trial to establish the truth of their allegations.

ARGUMENT

I

THE PROPERTY INTEREST AT ISSUE IN THIS CASE IS A MARKETABLE SERVITUDE CONVEYED TO SPECIFIC THIRD PARTIES BY THE CITY'S REGULATIONS

To determine whether an unconstitutional taking of property has occurred, the first step is to identify the property interest in question. The inquiry then turns to whether this specific property interest has been taken, applying the tests laid down by this Court for either regulatory or *per se* takings.

In the present case, the relevant property interest is a marketable servitude to occupy petitioners' land at below-market rents—a property interest recognized by state law and protected by the United States Constitution.

According to the complaint reviewed by the court below, Escondido's mobile home rent control limits the rents petitioners may charge for space in their parks to less than the amount that would be charged in an unregulated market. The city has also imposed vacancy control which means that petitioners may not adjust their rents to market levels even when a preexisting resident of their parks terminates a tenancy, sells his mobile home coach to a new resident, and moves out. Related state regulations prevent park owners from exercising any meaningful role in determining who may purchase a used coach in their parks from a preexisting resident. Thus, prospective coach buyers negotiate with preexisting residents to determine the price for a used coach *and* a statutory right to occupy petitioners' parks at less-than-market rent.

Under California law, one of the interests inhering in the ownership of property is the right to receive the rents and profits therefrom. *Calahan v. Martin*, 3 Cal. 2d 110, 119, 123 (1935). *See also Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980). The owner of a mobile home park may sell the right to collect rents from the park, or any part of those rents, thereby transferring a property interest which is called, by statute, a "servitude." Cal. Civ. Code § 802(4); *see Calahan*, 3 Cal. 2d at 120-21.

It is this marketable servitude that the Escondido regulations transfer from petitioners to the individuals who occupied their parks when the controls were adopted. Prior to enactment of the challenged regulations, Escondido's mobile home coach owners could have purchased a servitude from park owners guaranteeing them perpetual coach sites at below-market rents. The price of this servitude would have been determined through negotiations between park owners and coach owners, and the park owner would have received the agreed-upon amount in exchange for the property interest. Escondido's regulations preempt this market process by simply transferring the servitude to coach owners, who may then sell it to third parties without compensating park owners.

Escondido's regulatory scheme is far more than a mere restriction of petitioners' right to use their property. Rather, it grants a right to a specific group of individuals —those who occupied petitioners' parks when the controls were enacted—to use and dispose of a valuable property interest without petitioners' consent and without compensation. As stated by the Ninth Circuit in *Hall*

v. City of Santa Barbara, such an enactment "changes the fundamental relationship between the parties, giving landlord and tenant complementary estates in the same land." *Hall*, 833 F.2d at 1279.

The servitude that is granted to preexisting coach owners by the Escondido ordinance is a valuable commodity of a sort that can be freely bought and sold in the open market. The fair market value of the servitude can be estimated by the resale premium commanded by coaches located in petitioners' parks compared with identical coaches located on unregulated sites. *See* Hirsch & Hirsch, *Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol*, 35 UCLA L. Rev. 399 (1988).

This Court has set forth a number of tests to determine whether the City of Escondido, in depriving petitioners of the use and control of this valuable property interest, has violated the Takings Clause. The next section of this brief argues that petitioners have stated a claim for an unconstitutional taking of their property under this Court's standards for *regulatory* takings. In the alternative, it is then argued that the facts alleged by petitioners are sufficient to constitute a *per se* taking, *irrespective* of whether the city has authorized a "permanent physical invasion" of petitioners' land.

II

THE CALIFORNIA COURT OF APPEAL ERRED IN NOT FINDING A TAKING UNDER THIS COURT'S REGULATORY TAKINGS DOCTRINE

For nearly 70 years this Court has recognized that government regulation can so attenuate the rights of

property owners as to effect a taking under the Fifth Amendment. The criterion first laid down by Justice Holmes in 1922 applies with equal force today: "[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). The process of determining when a regulation "goes too far" has been revealed gradually by a line of decisions extending from *Pennsylvania Coal* down through what is currently this Court's leading decision in the field of regulatory takings law, *Nollan v. California Coastal Commission*, 483 U.S. 825.

A. Heightened Judicial Scrutiny Is Triggered when Property Regulations Are Challenged as Regulatory Takings

In *Nollan*, it was unequivocally proclaimed that property regulations challenged under the Takings Clause must receive heightened judicial scrutiny. *Nollan*, 483 U.S. at 835 n.3. Such enactments may no longer be upheld by reference to a "rational relationship" to their asserted objectives.

Nollan's heightened scrutiny requirement has been correctly noted and applied by state courts faced with federal takings claims brought under the Fourteenth Amendment. *See, e.g., Seawall Associates v. City of New York*, 542 N.E.2d 1059, 1068 (1989) (challenges of this sort require " 'semi-strict or heightened judicial scrutiny of regulatory means-ends relationships' as articulated in

Nollan"); *Surfside Colony, Ltd. v. California Coastal Commission*, 226 Cal. App. 3d 1260, 1270 (1991) ("*Nollan*, however, changed the standard of constitutional review in takings cases. Whether the new standard be described as 'substantial relationship,' or 'heightened scrutiny,' it is clear the rational basis test ... no longer controls." (Footnotes omitted)).

Notwithstanding this clear constitutional mandate, however, the California Court of Appeal in the proceedings below failed to apply the requisite level of scrutiny to the Escondido ordinance.

B. The Escondido Ordinance Does Not Substantially Advance a Legitimate Purpose Because New Park Residents Must Still Pay the Equivalent of Market Rent and Less Intrusive Alternatives Are Available

This Court has frequently stated that land use regulations will effect a taking if they fail to "substantially advance legitimate state interests," or if they "den[y] an owner economically viable use" of property. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). These two elements, which establish a threshold test of constitutional legitimacy, are stated in the disjunctive; *either* is sufficient to establish a regulatory taking without further analysis.

In *Nollan v. California Coastal Commission*, this Court reiterated the two-part threshold test. *Nollan*, 483 U.S. at 834. *Nollan* clearly illustrated that, when a regulation fails to substantially advance a legitimate government

interest, a taking occurs regardless of the economic impact on the property owner.

In the case at bar, the Escondido ordinance has been alleged to effect an uncompensated transfer of property from one group of private owners to another. The court below acknowledged that the city's regulations effected the alleged "transfer of value," yet found such forced transfers to be supported by a rational governmental interest and therefore not in conflict with the Takings Clause. *Yee v. City of Escondido*, 224 Cal. App. 3d at 1354.

In arriving at this conclusion, the California Court of Appeal fundamentally misconstrued the legal question that was before it. By framing the issue as whether the forced transfer of petitioners' property "can be justified by a rational governmental purpose," *id.*, the court below expressly applied the deferential "rational basis" standard of review repudiated by this Court in *Nollan*:

> "We have required that the regulation 'substantially advance' the 'legitimate state interest' sought to be achieved, *not* that 'the State *"could rationally have decided"* that the measure adopted might achieve the State's objective.' " *Nollan*, 483 U.S. at 835 n.3 (citations omitted; emphasis added).

This Court's regulatory takings doctrine does not permit abject judicial deference to legislative enactments merely because the measure at issue can be imagined to have some rational purpose. Rather, the courts have a duty to inquire whether property regulations challenged

under the Takings Clause *substantially advance* a legitimate interest. *Id.* The court below made no inquiry whatever into this question, which this Court has set forth as a mandatory threshold inquiry in regulatory takings cases.

The City of Escondido asserts that the legitimate interest advanced by its regulation is "protecting mobilehome owners" from paying competitive market rentals for space in mobile home parks. Respondent's Brief in Opposition to the Petition for Certiorari at 27. But that goal is accomplished for current park residents by rent control alone without imposing the additional burdens of vacancy controls (which prevent park owners from setting rents at market levels when current residents leave their parks).

It is sometimes claimed that vacancy controls are intended to secure the benefits of reduced rents for *future* park residents, yet this is a logical absurdity. Elementary economics demonstrates that the difference between controlled and market rents is capitalized into the in-site price of mobile home coaches. Hirsch & Hirsch, 35 UCLA L. Rev. at 443-44. Thus, the initial occupants of petitioners' property will convert the regulatory "protection" to cash as soon as they sell their coaches. No subsequent residents will benefit, for they must pay the full capitalized value of lower rents at the time they "buy into" the city's regulatory scheme. Under the heightened scrutiny required by *Nollan*, it is inconceivable that any court could find this one-time wealth transfer to *substantially advance* the welfare of mobile home owners in general.

Finally, the Ninth Circuit has speculated that regulations of this kind may serve a legitimate purpose in

protecting current residents from unscrupulous park owners who might otherwise raise rents at the end of a tenancy to force the sale of coaches to park owners at distressed prices. *Azul Pacifico*, 1991 WL 224528 at 12-16. Once again, however, the court has simply identified a possible legitimate objective with no meaningful inquiry into whether the ordinance in fact substantially advances this objective.

In an earlier formulation of the substantial advancement test this Court stated, "a use restriction on real property may constitute a 'taking' if not *reasonably necessary to the effectuation of [its] purpose.*" *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 127 (1978) (emphasis added). Clearly, seizing an uncompensated property interest from *all* park owners cannot remotely be described as "reasonably necessary" to prevent unscrupulous business practices by a few.

The City of Escondido could simply prohibit park owners from buying their residents' coaches. Or it could require such transactions to occur at fair market value as established by Blue Book prices or independent appraisal. By choosing to bypass these straightforward alternatives in favor of adopting a blatantly confiscatory regulation, Escondido has forfeited any claim that its ordinance is reasonably necessary to prevent the unfair dealings hypothesized in *Azul Pacifico*.

C. The California Court's Spurious "Economic Analysis" Cannot Substitute for the Heightened Scrutiny Required by this Court in Nollan

Petitioners alleged facts demonstrating that occupants of petitioners' mobile home parks had capitalized

the value of a marketable servitude into the in-site price of their coaches. Applying the heightened scrutiny required by this Court in *Nollan*, it would be impossible to avoid the implication that the City of Escondido's regulations had confiscated this servitude from petitioners and transferred it to those occupants without compensation.

As previously noted, however, the court below persistently declined to subject the challenged ordinance to heightened scrutiny. Instead, the California Court of Appeal indulged in a burlesque of pseudo-economic "analysis" in an effort to insulate the regulation from attack.

Rejecting the expert analysis of economic professionals (*cf.* Hirsch & Hirsch, *supra*), the court concocted its own fanciful lay theory analogizing the confiscation of petitioners' property to an adjustment in the prices of complementary goods. *Yee*, 224 Cal. App. 3d at 1352-53.

The fallacy in the court's reasoning is embarrassingly obvious. The relationship between true complementary goods does not vary radically from place to place within a market area—certainly not within a market the size of Escondido. If market forces (say, an increase in supply) had caused the value of mobile home parks to fall, the price of coaches would increase throughout the area. This would be a genuine adjustment in complementary prices —but this was emphatically *not* consistent with the allegations before the California court.

Mobile home rent regulations like Escondido's do not cause an increase in the price of all mobile home coaches,

as would occur through an adjustment in prices of complementary goods. Instead, only certain coaches are affected—specifically, those situated in existing parks. The prices of coaches occupying pads in parks such as petitioners' increase while the prices of coaches on unregulated sites and in dealer showrooms are unaffected. *See* Hirsch & Hirsch, 35 UCLA L. Rev. at 425, 430, 433-34. This is completely at odds with a "complementary goods" rationale but fully consistent with petitioners' claim that a valuable property interest had been seized and transferred to the owners of those specific coaches.

The crucial error, however, does not lie in the obvious shortcomings of the California court's purported "economic analysis." Rather, this remarkable exercise merely underscores the fact that the court was extending the greatest possible deference to the city's enactment. Rather than applying any semblance of heightened scrutiny, the court below attempted to concoct some arguably rational basis for the challenged ordinance. This directly contravenes the clear guidance of this Court as expressed in *Nollan* and resulted in a clearly erroneous finding of constitutionality.

D. The Escondido Regulation Deprives Petitioners of Economically Viable Use of Their Property

Turning to the second prong of the threshold test for regulatory takings, this Court has made it clear that regulations which deprive owners of economically viable use of their property will violate the Takings Clause, regardless of the merits of the state interests that may be

advanced. *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 264, 295-96 (1981); *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 14 (1984). The California Court of Appeal committed yet another fundamental error in the proceedings below by failing to subject the Escondido ordinance to this constitutionally mandated, independently sufficient test for a regulatory taking.

There can be no doubt that the servitude transferred by the City of Escondido to the owners of mobile home coaches is a protected property interest under the Fifth Amendment. This Court has defined the interests subject to constitutional protection as all those rights inhering in an individual's relation to the thing owned, including the rights of possession, use, and disposal. *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). Constitutionally protected property interests include not just fee interests and leaseholds, but "every sort of interest the citizen may possess." *Id.* at 378.

Especially in recent years, this Court has demonstrated a commitment "to what might be termed an 'unbundling' of property interests for purposes of applying the legal criteria in takings cases." Peterson, *Land Use Regulatory "Takings" Revisited: The New Supreme Court Approaches*, 39 Hastings L.J. 335, 357 (1988). Specific property interests that have been recognized by this Court under the Takings Clause have included the use of airspace, *United States v. Causby*, 328 U.S. 256 (1946); flowage easements, *United States v. Virginia Electric and Power Co.*, 365 U.S. 624 (1961); the right to devise property to one's heirs, *Hodel v. Irving*, 481 U.S. at 716; the right to exclude others, *Kaiser Aetna v. United States*, 444 U.S. 164; and

most pertinent to this case, the right to the profits from one's property, *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. at 164.

In the case at bar, the property interest in question is a marketable servitude granting perpetual occupancy in petitioners' mobile home park at below-market rents. By confiscating this servitude and transferring it to others, the Escondido ordinance completely deprives petitioners of any economically viable use (or indeed, any use at all) of this valuable property.

In describing the challenged measure as a "transfer of value," the court below implicitly acknowledges that the subject property interest has been seized from petitioners and transferred to the private beneficiaries of the ordinance. *Yee*, 224 Cal. App. 3d. at 1354. However, the court goes on to assert that such uncompensated transfers do not offend the Takings Clause if they are "justified by a rational governmental purpose." *Id.* The court then inquires into the level of rents authorized by the ordinance asserting that if petitioners are receiving a "fair" return *on their mobile home parks*, there has been no taking *of the servitude*.

By this assertion, the court below would simply eliminate the second prong of this Court's threshold test for regulatory takings. By the Court of Appeal's reasoning, unless a regulation deprives an individual of *all* property, it does not deprive him of *any* property. Such a contention is not only absurd on its face, it is directly contrary to the teachings of this Court.

This Court did not hesitate to find a regulatory taking in *Nollan*, although the affected property interest was

only a narrow unbuildable strip of the owners' land. *Nollan*, 483 U.S. at 828. This Court made the proper standard even more explicit in *Hodel v. Irving*, 481 U.S. at 704. That case involved a challenge to a federal statute providing that certain fractional property interests in Sioux Indian land must revert to the tribe upon the owner's death and could not be passed on to his survivors. In finding that this statute violated the Takings Clause, the Court fully considered the extent of the property right that was at issue: "Of course, the whole of appellees' decedents' property interests were not taken. . . . There is no question, however, that *the right to pass on valuable property to one's heirs is itself a valuable right.*" *Hodel v. Irving*, 481 U.S. at 714 (emphasis added). The law's complete deprivation of *this single element* of the owner's bundle of rights was sufficient for a unanimous Court to find that a compensable taking had occurred. *Id.* at 716-17.

In the case at bar, the Escondido ordinance completely deprives petitioners of a valuable servitude and transfers its ownership to third parties. No greater deprivation of economically viable use is imaginable. Under the clear standards laid down by this Court, the city's total deprivation of petitioners' use of this marketable property interest violates the Takings Clause in and of itself, without regard to the legitimacy of the governmental purposes being advanced.

E. The Escondido Ordinance Unfairly Requires a Small Group of Property Owners to Bear What Should Rightfully Be a General Public Burden

The two-part "substantial advancement/deprivation of use" test serves as a threshold that land use regulations must clear as the first step in determining whether they violate the Takings Clause. Measures that fail to substantially advance legitimate interests or deny economically viable use of property must be struck down without further ado unless just compensation is paid. However, even regulations that meet these threshold requirements may still be held to violate the Takings Clause under a number of specific criteria that have been developed by this Court.

In the case at bar, even if it were possible to hold that the Escondido ordinance survives the two-part threshold test, it violates the Takings Clause by requiring plaintiffs alone to bear what should rightfully be a general public burden. As this Court has repeatedly emphasized, "[o]ne of the principal purposes of the Takings Clause is 'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' " *Nollan*, 483 U.S. at 835 n.4 (quoting *Armstrong v. United States*, 346 U.S. 40, 49 (1960)).

The benefit sought by Escondido's ordinance is the provision of subsidies for a small, favored class of property owners--those specific individuals who owned mobile homes located in existing parks at the time the ordinance was adopted. This benefit can be construed in

only two possible ways. It may accrue primarily to the favored few individuals, in which case the benefit is clearly private in nature; or transferring property to these few persons may be held, in some metaphysical sense, to enhance the general welfare of the city.

If the benefits of Escondido's regulations are limited to the coach owners who happened to occupy park sites at the time of enactment, then the city has done nothing more than to force the uncompensated transfer of a valuable property interest from one small group of owners to another. Such a private-interest transfer would violate the Takings Clause on its face. "A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void." *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 245 (1984).

In the alternative, if it is claimed that the regulations provide some diffuse public benefit in the nature of a general welfare program, then the city is constitutionally prohibited from singling out a small group of owners to bear the costs of the regulation. Any claim of general, citywide benefit from the transfer of the subject property interest would demonstrate "that the obligations placed on a few property owners are just the kind which could, and should, be borne by the taxpayers as a whole." *Seawall Associates*, 542 N.E.2d at 1069. *See also Pennell v. City of San Jose*, 458 U.S. 1, 21-22 (1988) (Scalia, J., dissenting).

The City of Escondido has the authority under its police powers to allocate its general revenues to subsidize any favored groups it pleases. However, forcing one

small group of property owners to bear the full costs of such a program is an affront to basic concepts of equity. The issue is not whether the benefits of subsidies to coach owners are worth the costs but rather who should pay. "[T]he question at bottom is upon whom the loss ... should fall." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 416. As this Court concluded regarding the governmental objective in *Nollan*, "[t]he Commission may well be right that it is a good idea, but that does not establish that the Nollans (and other coastal residents) alone can be compelled to contribute to its realization. . . . [If California] wants an easement across the Nollans' property, it must pay for it." *Nollan*, 483 U.S. at 841. This conclusion is directly applicable to the case at bar. If the City of Escondido wants to transfer wealth to those individuals who occupy petitioners' land at a certain point in time, it is constitutionally required to pay for the subsidies out of general city revenues.

III

THE COURT BELOW ERRED IN NOT FINDING A PER SE TAKING IN THE UNCOMPENSATED TRANSFER OF AN INTEREST IN TITLE FROM ONE GROUP OF PRIVATE PARTIES TO ANOTHER

As established in the preceding section, the ordinance at issue in this case blatantly violates this Court's regulatory takings guidelines, regardless of whether it authorizes a permanent physical invasion of petitioners' property. Alternatively, it can be argued that it is unnecessary to subject measures such as this one to the regulatory takings tests since outright uncompensated transfers

of valuable property interests have been treated by this Court as *per se* violations of the Takings Clause.

A. An Uncompensated Transfer of an Interest in Title Is a Per Se Violation of the Takings Clause

One of the most consistent guideposts of this Court's takings jurisprudence has been a careful examination of the "character of the government action" challenged as a taking. *Penn Central Transportation Co. v. City of New York*, 438 U.S. at 124. It is well known that, when the character of the challenged action can be likened to a permanent physical invasion of property, the measure will be characterized as a *per se* violation of the Takings Clause. *Loretto*, 458 U.S. at 426. In a less widely recognized line of cases, this Court has dealt similarly with enactments purporting to transfer an interest in title without compensating the owners.

The transfer of an interest in title (such as a servitude) has often been held to constitute a taking by this Court. For example, the City of Escondido's seizure of petitioners' servitude is remarkably similar to the governmental action in *Kaiser Aetna*, 444 U.S. 164. There, the federal government claimed that, because a property owner had connected a private pond to the navigable waters of the United States, the public had acquired a servitude granting common access to the owner's private property. This Court held that the attempt to seize such a servitude "goes so far beyond ordinary regulation . . . as to amount to a taking." *Id.* at 178.

Because the character of the government action in *Kaiser Aetna* is distinguished from ordinary regulation, commentators tend to refer to it as a physical invasion case. But in fact the pond owner did not object to the physical presence of boats on its pond. The whole purpose behind constructing the channel, after all, was to increase the ability of boats to use the pond. It was the government's attempt to seize a servitude entitling the public to use the pond *without paying the owner's yacht club fees* that was found to constitute a taking.

This closely parallels the situation in the case at bar where the City of Escondido has granted coach owners a marketable right to use petitioners' property without paying the owners' full price for that use. The only relevant distinction between *Kaiser Aetna* and the case at bar is that the City of Escondido has not seized a servitude *for the benefit of the public*. Rather, ownership of petitioners' servitude was transferred—by legislative fiat—to the private parties who happened to occupy mobile home pads at the time the ordinance was adopted.

Another case in which this Court struck down an uncompensated transfer of an interest in title is *Hodel v. Irving*, 481 U.S. 704. There, Congress attempted to transfer small common tenancy interests in land from the Indians who owned them to the tribe. *Id.* at 708-09. After going through the analysis for regulatory takings, this Court stated: "If we were to stop our analysis at this point, we might very well find § 207 constitutional. But the character of the Government regulation here is extraordinary." *Id.* at 716. Then, likening the case to *Kaiser Aetna*, the Court ruled that the uncompensated transfer of even these small residual interests (valued at as little as

five cents per annum) amounted to an unconstitutional taking. Thus, while not a physical invasion case, *Hodel* cannot properly be considered a regulatory taking case either. Instead, it falls into a third category of cases in which this Court has found a violation of the Takings Clause in the legislative transfer of an interest in title from one private party to another.

In *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935), Congress adopted an amendment to the Bankruptcy Act intended to restrict the foreclosure of mortgages on farms during the Great Depression. Due to prevailing economic conditions, this measure had the effect of granting bankrupt farmers the right to redeem foreclosed-upon properties at less than the outstanding mortgage obligation or else to remain in possession of the property for five years at a reduced rate. *Id.* at 575-76. This Court invalidated the amendment as a taking because it transferred to the farmer an interest in property that belonged to the holder of the mortgage. *Id.* at 594-95, 601-02.

In *Louisville Bank*, as in *Kaiser Aetna*, the petitioner did not object to the physical presence of third parties on the property. After all, if Radford left Louisville Bank would have rented the farm to someone else. What comprised a taking was the creation of a servitude entitling Radford to remain on the property without paying the bank its full price.

A more recent case involving the transfer of an interest in title is *Nollan v. California Coastal Commission*, 483 U.S. 825. There a state agency required a property owner to convey an easement (a type of servitude) to the

state as a condition of issuing a building permit. Prior to deciding whether the conveyance could be required as a permit condition, this Court considered whether such a transfer could be accomplished by simple legislative fiat--as the City of Escondido has done in the case at bar. On that question, this Court held:

> "Had California simply required the Nollans to make an easement across their beachfront available to the public . . . rather than conditioning their permit . . . we have no doubt there would have been a taking." *Id.* at 831.

Like the plaintiffs in *Kaiser Aetna* and *Louisville Bank*, the Nollans were not complaining about the physical presence of people on their beach. The Nollans already freely permitted people to traverse their beach. *Id.* at 858 (Brennan, J., dissenting). It was the transfer to the public of a formal right to be there, as owners of an interest in the Nollans' title, that would have comprised a taking had a transfer by legislative fiat occurred.

B. The Mere Fact That Petitioners Are in the Rental Business Does Not Legitimize an Uncompensated Seizure of Their Property

The court below attached great significance to the fact that petitioners are not forced involuntarily to accept the occupation of their property, since they were already in the business of renting their property to others. *Yee*, 224 Cal. App. 3d at 1358. However, this fact in no way distinguishes the present case from the foregoing line of Supreme Court precedent regarding the seizure of an interest in title.

The California Court of Appeal sought to portray petitioners' taking claim as inconsistent with *Federal Communications Commission v. Florida Power Corp.*, 480 U.S. 245 (1987), wherein this Court rejected a challenge to the Pole Attachments Act on a physical invasion theory.

It should first be noted that *Florida Power* did not discuss the rule that an outright transfer of an interest in title constitutes a taking. Nor can *Florida Power* be interpreted as a retreat from that rule since both *Hodel v. Irving* and *Nollan* were decided after *Florida Power*.

Furthermore, the facts of *Florida Power* have virtually no similarity to the case at bar. This Court declined to find a taking in *Florida Power* because "nothing in the Pole Attachments Act ... gives cable companies any right to occupy space on utility poles, or prohibits utility companies from refusing to enter into attachment agreements." *Florida Power*, 480 U.S. at 251. In other words, *there was no transfer to cable companies of a right to occupy the power company's poles at reduced rent*. If a cable company decided to remove its cables from the poles, it had no rights in the poles to sell to another cable company. This contrasts sharply with the instant case where outgoing coach owners have been granted precisely this right. They say who will occupy the park owner's property next and can sell to the next tenant their right to pay below-market rent.

The Escondido ordinance has an impact on petitioners wholly unrelated to the normally foreseeable consequences of operating rental property. The city's regulations effectively reduce petitioners from the owners

of a fee interest in private rental property to mere caretakers of public housing. Eviction controls, rent controls, and vacancy controls have the combined effect of extinguishing the park owner's right to determine *whether* his property will be occupied, *who* may occupy it, and *what price* he will accept for a stranger to occupy it. As a final evidence of expropriation, the park owner is even deprived of the proceeds when a part of his property (the legislatively-created servitude) is sold. What the owners retain is, in essence, a modest salary from the government for their caretaking services in the form of the government-set rent. (They also retain, of course, full liability for any injuries on their property and the privilege of paying taxes.)

Clearly, the effect on property owners of an uncompensated transfer of an interest in title can be just as devastating as the authorization of a permanent physical invasion. This may be the reason why transfer of title cases are often equated with physical invasion cases by commentators. However, this Court's decisions in *Kaiser Aetna*, *Hodel*, *Louisville Bank*, and *Nollan* demonstrate that the Escondido ordinance violates the Takings Clause because of its uncompensated transfer of an interest in title, regardless of whether a physical invasion has in fact occurred. This conclusion is wholly unaffected by petitioners' prior decision to engage in the business of renting spaces in mobile home parks.

CONCLUSION

Petitioners have alleged that Escondido's ordinance transfers an interest in their property to occupants of their mobile home parks and that outgoing occupants are selling to others the right to occupy petitioners' property at a reduced rent. According to the complaint, the premium that incoming park residents are paying (in excess of the showroom value of the mobile home coach) represents the present value of the rents park owners are prohibited from charging. Reasonably enough, petitioners sought the opportunity to prove these allegations in court.

The California Court of Appeal, notwithstanding that the case came to it on demurrer so that all facts pled in the complaint must be presumed true, opined that new park residents are not really paying a premium for the right to pay less rent. The Court of Appeal asserted that this premium is somehow paid for the coach itself, even though identical coaches not situated on petitioners' property sell for substantially less. *Yee v. City of Escondido*, 224 Cal. App. 3d 1349, 1352-53. As pointed out in the dissent, this reasoning illustrates the danger of judges relying on their own lay opinions rather than allowing factual questions to go to trial.

Petitioners have adequately pled the transfer of an interest in their property. According to the decisions of this Court discussed above, the legislative transfer of such an interest without compensation is a *per se* taking. The facts alleged by petitioners also establish a regulatory taking under an overwhelming line of authority stretching from *Pennsylvania Coal* to *Nollan*.

For the reasons stated above, it is respectfully submitted that this case should be remanded for trial so that, if petitioners' allegations are proved, the regulatory scheme at issue can be declared a taking.

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